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December 14, 2020

The Honorable Representative Ralph Massullo, Chair
House Staff Affairs Committee
Florida House of Representatives
402 S. Monroe Street, Room 209 HOB
Tallahassee, FL 32399-1100

The Honorable Ray Rodrigues, Chair
Senate Governmental Oversight & Accountability Committee
The Florida Senate
404 S. Monroe Street, Room 330 Knott Building
Tallahassee, FL 32399-1300

Re: Exemptions Subject to Open Government Sunset Review – 2021

Dear Representative Massullo and Senator Rodrigues:

The First Amendment Foundation has reviewed the exemptions from public records and open meetings requirements subject to review and repeal under the Open Government Sunset Review Act during the 2021 legislative session. There are at least 28 exemptions up for review. Of these exemptions, 21 deal with trade secrets or proprietary business information. The Foundation views this as an opportunity to let trade secret exemptions sunset in exchange for a uniform definition of trade secrets. This approach could significantly simplify the confusion surrounding the proper application of trade secret exemptions.

This year, we have witnessed agencies refuse to release information related to bids and contract terms claiming trade secrets. As one example, the State Agency of Health Care Administration refused to release records showing how much

Deloitte Consulting bid on a \$135 million contract to oversee the state's Medicaid data. The agency announced the contract – and refused to release the bid amounts – months after another Deloitte project, the CONNECT unemployment system, failed during the pandemic. Because of the trade secret claim, the public is in the dark regarding Deloitte's bid. Taxpayers cannot learn how the company's bid compared to other bids.

Similarly, the state's tourism marketing corporation, Visit Florida, refused to release details of a contract between the agency and rapper Pitbull to promote the state. After the House of Representatives sued for the information, Pitbull eventually revealed on social media how much the state agency paid him. It was Pitbull, not Visit Florida, who provided transparency regarding the contract to the public. Apparently, he did not view his contract as a "trade secret".

Once a contract has been awarded, a business no longer has an advantage in hiding the amount of its bid. Moreover, the taxpayer has a right to know how much agencies are paying contractors.

There has been recent efforts in the legislature to provide a consistent definition of trade secrets. For instance, last year's HB 799 and HB 801 would have repealed most trade secret exemptions and provided a uniform trade secret exemption. According to the bill analysis for HB 799, this legislation would have specifically excluded certain information from the definition of trade secrets, including:

- The parties to a contract or agreement, or an addendum thereto.
- The amount of money paid, any payment structure or plan, expenditures, incentives, bonuses, fees, or penalties.
- The nature or type of commodities or services purchased; and
- Applicable contract unit prices and deliverables.

A party claiming the trade secret exemption would have been required by HB 799 to give notice and verify the trade secret by signing a written declaration under the penalty of perjury. Any party who failed to sign the verification and notice would waive any claim that the record is protected under the law. Public records are presumed to be open – exemptions should only apply if strict criteria are met. The current patchwork approach, where each agency or industry has different processes and rules, results in an over-application of what should be a narrow exemption. Instead of numerous trade secret exemptions, such legislation would provide one uniform trade secret exemption definition and one process to seek an exemption. This would offer clarity to records custodians and individuals seeking records.

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With more than 20 trade secret exemptions up for review this legislative session, this is an opportune time to let the myriad trade secret exemptions sunset and enact a uniform definition – especially one that excludes the terms of payment of contracts from the definition. The public has a right to know how their tax dollars are being spent and how much the state is paying private contractors. This promotes accountability and responsible government. The First Amendment Foundation supports the sunset of various trade secret exemptions and efforts to simplify public records exemptions and clarify the law.

Please let us know if you have any questions or need additional information.

Sincerely,

A handwritten signature in blue ink that reads "Pamela C. Marsh". The signature is fluid and cursive, with a long horizontal line extending to the right.

Pamela C. Marsh, President

Cc: Heather Williamson, Staff Director, House State Affairs Committee
Joe McVaney, Staff Director, Senate Governmental Oversight & Accountability
Committee
Jim Baltzelle, Chair, First Amendment Foundation
Bob Shaw, Chair, First Amendment Foundation Legislative Committee